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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/551,828	09/30/2005	Glen Crofskey	19134	3992

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EXAMINER	
DEES, NIKKI H	

ART UNIT	PAPER NUMBER
1794	

MAIL DATE	DELIVERY MODE
01/30/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/551,828	CROFSKEY ET AL.	
	Examiner	Art Unit	
	Nikki H. Dees	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 October 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-24* is/are pending in the application.

4a) Of the above claim(s) *12-24* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-11* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *20 March 2006*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of Group I, Claims 1-11, in the reply filed on October 29, 2008, is acknowledged. The traversal is on the ground(s) that the amended claims now require the same degree of esterification in the pectin. Applicant argues that the process inherently produces the claimed product. This argument is not persuasive. MPEP 1893.03 (d) states that "the claimed process inherently produces the claimed product with the technical relationship being present between the claimed process and the claimed product". In this case, the condition is not met because the process requires homogenizing and drying steps. The product as claimed is not a homogenized and dried product; thus, it is not inherent that the process produces the claimed product and the product does not have the technical features produced from the processing steps.

The requirement is still deemed proper and is therefore made FINAL.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1-7, 10, and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Cerda et al. (5,514,666).

4. Cerda et al. teach a protein powder composition comprising pectin having a degree of esterification ≥ 50% (high ester or high methoxyl (HM) pectin). The pectin is present in a specific example at 5 wt% of the protein. The protein powder composition has a pH of less than 7 (Example 1). Regarding the adsorption of the pectin to the protein base, as the Cerda et al. teach the mixing of the pectin and the protein, it is considered inherent that the pectin would be adsorbed to the protein, as is claimed by Applicants. These teachings anticipate Applicant's claims 1-4.

5. Regarding claims 5-7, as the protein powder composition of the prior art meets the limitations of the protein powder composition of the instant claims it is considered to be inherent that the prior art composition would have provided the protein liquid with an increased stability as required. It is also considered to be inherent that the prior art composition would possess a viscosity as claimed. Claims 5-7 are thus considered anticipated by the prior art absent any convincing arguments or evidence to the contrary.

6. The protein base of the protein powder composition may be milk (Example 2) The powder may be reconstituted in foodstuffs including salad dressings and juices (col. 3 lines 58-67). These teachings anticipate Applicant's claims 10 and 11.

Claim Rejections - 35 USC § 102/103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

8. Claims 8 and 9 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Cerda et al. (5,514,666) with evidence provided by May (May, C.D. 2000. Pectins. In Phillips, G.O.; Williams, P.A. Handbook of Hydrocolloids. pp. 169-188. Woodhead Publishing).

9. Cerda et al. do not speak to the specific degree of esterification of their pectin, other than it is a HM pectin (i.e. pectin with degree of esterification equal to or greater than 50%). One of ordinary skill in the art at the time the invention was made would have been able to clearly envisage the use of a pectin have a degree of esterification of greater than 60 or 70 % where a HM pectin was taught by the prior art. Alternatively, one of ordinary skill would have found it obvious to select a HM pectin having a degree of esterification of greater than 60 or 70%. May teaches that commercial pectin commonly has a degree of esterification of around 67-73% (p. 172), indicating that one of ordinary skill would have found it obvious to utilize a pectin having a degree of esterification common to commercial HM pectins. Undue experimentation would not have been required, and there would have been a reasonable expectation that the resultant product would have maintained its physical and organoleptic properties.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nikki H. Dees whose telephone number is (571) 270-3435. The examiner can normally be reached on Monday-Friday 7:30-5:00 EST (second Friday off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, D. Lawrence Tarazano can be reached on (571) 272-1515. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Nikki H. Dees/
Examiner, Art Unit 1794
/Lien T Tran/

Nikki H. Dees
Examiner
Art Unit 1794

Primary Examiner, Art Unit 1794